BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

DOCKET NO. 2020-263-E

Cherokee County Cogeneration Partners, LLC Complainant/Petitioner, v. Duke Energy Progress, LLC and Duke Energy Carolinas, LLC, Defendants/Respondents.	)	**DUKE ENERGY CAROLINAS, LLC's AND DUKE ENERGY PROGRESS, LLC's RESPONSE IN OPPOSITION TO CHEROKEE COUNTY COGENERATION PARTNERS, LLC'S PETITION FOR RECONSIDERATION OR REHEARING**

Pursuant to S.C. Code Ann. § 58-27-2150 and S.C. Code Ann. Regs. 103-854, 103-825 and 103-830, Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (together, the "Companies"), by and through counsel, respectfully submit this Response in Opposition to Cherokee County Cogeneration Partners, LLC's ("Cherokee") second Petition for Rehearing or Reconsideration ("Second Petition for Rehearing" or the "Petition").

On October 12, 2021, this Commission entered its Order Denying Petitions for Rehearing or Reconsideration and Providing Clarification ("Clarification Order" or the "Order"). In the Order, the Commission clarified that the October 2018 avoided cost rate set forth in Hearing Exhibit 14 (the Companies' Corrected Late-Filed Exhibit No. 1) are the avoided cost rates to which Cherokee is entitled. *Clarification Order* at 8. In particular, the Commission found that the Companies' Hearing Exhibit 14 was:

> [B]ased on evidence in the record from DEC which calculated the avoided cost rate in accordance with the provisions of [the Public Utility Regulatory Policies Act ("PURPA")] and applicable law existing at the time

> Cherokee established its [legally enforceable obligation ("LEO")] with DEC, pursuant to a ten-year, dispatchable tolling agreement, the form and term of which Cherokee and DEC/DEP agreed.

Id.

Cherokee's Second Petition for Rehearing challenges the Commission's clarification of Order No. 2021-604 and essentially asks the Commission to fundamentally change its decision to now order DEC to pay Cherokee at the significantly higher rate of $90/kW-year developed by Cherokee Witness Kurt Strunk and that Cherokee proposed in its case-in-chief.

As further addressed herein, the Commission should deny Cherokee's Second Petition for Rehearing, as Cherokee's rate proposal continues to be significantly in excess of DEC's actual avoided costs as of September 2018 and would result in unjust and unreasonable customer overpayment in excess of DEC's avoided costs. Cherokee also repeats a number of arguments that mischaracterize both the law and the applicable evidence in the record that have become a hallmark of Cherokee's approach to this case and that the Commission has essentially already rejected in its denial of Cherokee's first Petition for Reconsideration.

Cherokee again argues that the Companies must pay QFs for capacity in each contract year, regardless of whether they have identified any need for undesignated capacity in that year, based upon the Commission's pre-existing PURPA implementation Order No. 2016-349. However, as extensively addressed in this proceeding, Order No. 2016-349 directed the Companies to negotiate with QFs above two megawatts not eligible for the Companies' standard offer rates and to offer rates that are consistent with PURPA and FERC's implementing regulations. This is precisely the approach the Companies took.

In fact, and as discussed in more detail below, the only existing South Carolina precedent addressing the capacity need question for DEC is this Commission's Order No. 2019-881(A) which approved the Companies' application of the peaker methodology and affirmatively found customers should not be obligated to pay QFs for capacity prior to the first year in which it is needed to serve system load. As supported by DEC's witnesses and further detailed herein, this methodology is consistent with longstanding FERC precedent interpreting PURPA and fully consistent with the Companies' treatment of other large QFs in September 2018.

Cherokee suggests that there is not "substantial" evidence in the record to support the Commission's finding that the avoided energy and avoided capacity costs in Hearing Exhibit 14 are the appropriate rates for a successor PPA between DEC and Cherokee. Unlike the significantly higher avoided cost rates developed by Cherokee's expert, Mr. Kurt Strunk, however, Hearing Exhibit 14 provides rates that are well supported by evidence, consistent with the methodology approved by the Commission in Order No. 2019-881(A), supported by the South Carolina Office of Regulatory Staff ("ORS"), and reflective of the Companies' actual avoided costs. Moreover, Cherokee's characterization of the record as lacking significantly misrepresents the evidence presented.

As the ORS stated in its September 14, 2021 letter to the Commission in response to Cherokee's and DEC's initial Petitions for Rehearing and Reconsideration, "the avoided cost rate proposed by Cherokee is not consistent with the methodology approved by the Commission in Order No. 2019-881(A)[, and] Cherokee's proposed rate would result in Duke customers paying significantly more for power purchased from Cherokee than it would otherwise cost Duke to generate power itself." ORS Sept. 2021 Letter, at 1-2.

In sum, the Clarification Order reasonably finds that Hearing Exhibit 14 appropriately set forth DEC's avoided cost rate for a ten-year dispatchable tolling agreement as of October 2018, the time that the Commission determined Cherokee asserted a LEO. Clarification Order at 8. These rates provide Cherokee the benefit of the ten-year dispatchable tolling agreement structure requested by Cherokee and agreed to by DEC. Cherokee's chief complaint in this Second Petition for Rehearing continues to be that the avoided cost rates calculated by DEC and presented in Hearing Exhibit 14 are lower than rates proposed by Cherokee's expert witness, Mr. Strunk ($50.06/kW-year vs. $90.00/kW-year). However, contrary to Cherokee's argument, the record supports that the Hearing Exhibit 14 rates were developed in accordance with the peaker methodology used by DEC in October 2018 to calculate avoided cost rates for all negotiated large non-standard offer QFs and consistent with the methodology approved by the Commission in Order No. 2019-881(A).

For these reasons, and as set forth in more detail below, the Companies respectfully request that the Commission deny Cherokee's Petition for Rehearing or Reconsideration.

I. The Avoided Costs Calculation Methodology Used to Calculate the Rates in Hearing Exhibit 14 Was Reasonable and Appropriate

Since filing its initial Complaint in November 2020, Cherokee has repeatedly insisted that its 98-megawatt ("MW") cogeneration facility is entitled to significantly higher avoided capacity payments based upon the stipulated standard offer tariff avoided cost rates summarily approved by the Commission in Order No. 2016-349 that were available only to small standard offer QFs 2 MW or less in the fall of 2018. Despite the fact that the Cherokee Facility is nearly fifty times the size of QFs eligible for the stipulated standard offer rates approved in Order No. 2016-349, Cherokee has consistently ignored

throughout this proceeding that it was never eligible for DEC's standard offer tariff rates approved in Order No. 2016-349. Cherokee's Second Petition for Rehearing continues to make the same argument that the stipulated standard offer tariff rates somehow established a methodology that DEC was obligated to use in calculating avoided cost rates in October 2018 for Cherokee.

To support its argument, Cherokee's again argues that Order No. 2016-349 implicitly adopts a December 31, 2014 ruling of the North Carolina Utilities Commission ("NCUC") that, for a brief period that ended in 2017, rejected the concept of capacity payments based on need for purposes of calculating DEC's and DEP's standard offer rates in North Carolina (the "2014 Sub 140 Order").[1] Petition at 9. Despite Cherokee's consistent repetition of this argument throughout the proceeding, the connection between Order No. 2016-349 and the NCUC's 2014 Sub 140 Order is anything but direct. Order No. 2016-349 did not even reference the 2014 Sub 140 Order, let alone establish a Commission-mandated and/or approved methodology that DEC was obligated to utilize in calculating avoided cost rates for Cherokee based on the prior NCUC Order.[2] Accordingly,

[1] The North Carolina Utilities Commission reversed this decision in October 2017—nearly a year before Cherokee purported to establish a LEO with DEC in 2018. *See In the Matter of Biennial Determination of Avoided Cost Rates for Electric Utility Purchases from Qualifying Facilities – 2016*, Order Establishing Standard Rates and Contract Terms for Qualifying Facilities, Docket No. E-100, Sub 148, at 109 (Ordering Paragraph 4) ("DEC, DEP, and Dominion shall calculate avoided capacity rates using the peaker method and include a levelized payment for capacity over the term of the contract that provides a payment for capacity in years that the utility's IRP forecast period demonstrates a capacity need"). On cross-examination, Witness Strunk acknowledged that this 2017 NCUC Order directed utilities to pay QFs only for needed capacity and that the Order was "closer in time . . . to when Duke provided the avoided cost rates to Cherokee in the fall of 2018." (Tr. Vol. 3, p.612.)

[2] The only NCUC order referenced in Order No. 2016-349 is the NCUC's March 10, 2016 Order in Docket No. E-100, Sub 140 (the "2016 Sub 140 Order"). The 2016 Sub 140 Order is a 1.5 page document that summarily approves—without any substantive discussion or analysis—a stipulation between the Companies, the North Carolina Public Staff, and certain intervenors updating the rates included in Schedule PP available to small QFs five MW in size or less. This Commission's Order No. 2016-349 does not contain any reference

Cherokee's argument that this Commission adopted and directed DEC to use a methodology that was never presented to the Commission and not even mentioned through an order is simply not credible.

In fact, the Commission's Order No. 2016-349 did not contain *any* discussion, direction, or ruling regarding a rate calculation methodology applicable to large QFs like Cherokee—a fact which Cherokee's own expert witness acknowledged several times in live testimony:

rebuttal testimony. But to be clear, as it relates to large QFs, there was no approved methodology that Duke was required to follow coming out of that 2016 order; is that correct?

A. There was no approved methodology, no.

(Tr. Vol. 1, p. 190.)

So, to be clear, Order 2016-349 on its face did not approve a methodology. You say it implicitly went against this principle, but it didn't dictate a methodology that the companies shall apply in calculating avoided-cost rates for large QFs, right?

A No, the direction that that order gave was that the utilities were supposed to negotiate rates with large QFs.

(Tr. Vol. 3, p. 617.)

to the NCUC's December 31, 2014 Order, nor are the Companies aware of any other docket in which the Commission adopted or even was presented with evidence that expressly relied upon the NCUC's Order from December 31, 2014.

Contrary to Cherokee's continued mis-characterization of Order No. 2016-349, this brief 1.5 page order simply approved a stipulated revision to the Companies' standard offer tariff available only to small standard offer QFs 2 MW or less by adopting 10-year avoided cost rates previously approved by the NCUC earlier in 2016.

Specific to the avoided cost rates for large QFs like Cherokee that were not eligible for DEC's standard offer tariff, Order No. 2016-349 directed that "[a]ll rates for QFs above two MW, or otherwise ineligible for the standard tariffs, shall be negotiated under [PURPA] and the [FERC's] implementing regulations." Order No. 2016-349, at 2. Thus, the Commission expressly spoke to the procedure for setting avoided cost rates applicable to large QFs through negotiation and ordered that such rates shall be negotiated consistent with PURPA and FERC's implementing regulations.

In the absence of a Commission-approved methodology applicable to large cogeneration QFs like Cherokee,[3] DEC calculated its avoided cost rates using the same methodology that it used to negotiate with all other large QFs in the fall of 2018 and in a manner consistent with both PURPA[4] and the Commission's implementation of PURPA at the time. (Tr. Vol. 2, pp. 331.6-.8, 339.) The methodology DEC used, including

[3] Notably, the Commission was not required under South Carolina law to review and approve the methodology used by a utility to calculate its avoided cost rates prior to the passage of Act 62. *See* S.C. Code Ann. § 58-41-20(A) (requiring the Commission to "open a docket for the purpose of establishing each electrical utility's standard offer, avoided cost methodologies . . .).

[4] Under PURPA, QFs must be fairly and reasonably compensated for the incremental capacity and energy costs that, *but for* capacity and energy provided by the QF, the utility would be forced to generate or purchase elsewhere to serve its customers. 16 U.S.C. § 824a-3(d) (defining incremental cost of alternative energy under PURPA). In other words, PURPA was not intended to force a utility (and its customers) to pay for capacity that it does not otherwise need. *See Order No. 872* at P 171 discussed *infra*. FERC reiterated this longstanding precedent in Order No. 872, finding that "the Commission cannot require that prices charged by a QF exceed the purchasing electric utility's avoided cost, *if a purchasing electric utility has no need for additional capacity . . . the purchasing utility's avoided cost for capacity would be zero*." Order No. 872 at P 171 (*citing* 168 FERC ¶ 61,184 at P 33 n.58 and *Ketchikan,* 94 FERC ¶ 61,293) (emphasis added).

recognizing the utility's first year of capacity need, had recently been considered and accepted by the Commission for another utility as consistent with PURPA. *See In re: Annual Review of Base Rates for Fuel Costs for South Carolina Electric & Gas Company*, Order No. 2018-322(A), Docket No. 2018-2-E (May 2, 2018) ("The Commission finds that SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time[.]"). During cross-examination, Cherokee's witness, Mr. Strunk, admitted that he had not reviewed Order No. 2018-322(A) in preparing his testimony for this case, (Tr. Vol. 3, p. 620), but acknowledged that the order approved zero capacity payments to QFs. (Tr. Vol. 3, p. 623.)

The Commission has fully vetted DEC's application of the peaker methodology in Order No. 2019-881(A), including calculating avoided capacity rates based on the utility's first year of undesignated capacity need, and determined it to be reasonable and appropriate for calculating avoided cost rates for large QFs under Act 62. After an extensive contested proceeding, the Commission approved this methodology in Order No. 2019-881(A), setting rates and establishing the avoided cost rate calculation methodology effective as of November 2018 for all QFs (both standard offer and large QFs). Order No. 2019-881(A), at 91-92 ("customers should not be required to pay solar QFs for capacity prior to the first year in which it is needed to serve system load")

Accordingly, the Commission's decision in its Clarification Order was consistent with *both* applicable South Carolina law at the time the Commission has determined Cherokee established a LEO *and* with the methodology subsequently approved by the Commission under Act 62. Because Witness Strunk's avoided capacity cost calculations are demonstrably higher than DEC's avoided capacity cost at any point since negotiations

commenced, (Tr. Vol. 2, p. 345), they cannot be implemented without overcharging customers at unjust and unreasonable rates and treating Cherokee more favorably than any other Large QF.

II. The Commission's Order Providing Clarification is Supported by "Substantial" Record Evidence

Cherokee argues that the Companies failed to offer "'reliable, probative, and substantial evidence' in opposition to Cherokee's proposed rate." Petition. at 15, *quoting Porter v. S.C. Pub. Serv. Comm'n*, 332 S.C. 93, 98 (1998). While it is true that South Carolina administrative bodies like the Commission must base their findings on "substantial" evidence, such findings are viewed as "presumptively correct." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 21 (1998). Indeed, the Supreme Court of South Carolina has found that "substantial" evidence is "more than a mere scintilla of evidence, but . . . something less than the weight of the evidence. Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a [reviewing] court from concluding that substantial evidence supports an administrative agency's finding. *Id.* at 20-21. Here, there is "substantial" evidence in the record to support the Commission's findings in its Clarification Order.

A. "Substantial" Record Evidence Supports the Commission's Adoption of the Avoided Energy Rate Set Forth in Hearing Exhibit 14

Cherokee contends that "there is *no* record evidence to support the energy component of [the Commission-approved] avoided cost rate." Petition. at 2. This is patently untrue.

1. Hearing Exhibit 14 is part of the official record in this proceeding.

As a threshold matter, the avoided energy rate approved by the Commission is set forth in Hearing Exhibit 14, and Hearing Exhibit 14 is part of the official record in this

proceeding. At the July 29, 2021 hearing in this matter, Commissioner C. Williams asked DEC/DEP Witness John Freund to "update" his Figure 1 presented in his pre-filed direct testimony to "add, where it is possible, what the Duke avoided energy value, avoided capacity value, and the avoided cost is." (Tr. Vol. 2, p. 384.) The Companies' responsive Late-Filed Exhibit was marked as Hearing Exhibit 14 and is now included in the official transcript of the proceeding. While Cherokee filed twelve pages of detailed comments on the Exhibit, it did not move to strike Hearing Exhibit 14 or otherwise ask for an opportunity to cross examine the Companies' witnesses on the Exhibit, and it has never before objected to the inclusion of the Exhibit in the record.

2. The Avoided Cost Rates in Hearing Exhibit 14 Were Prepared Using the Peaker Methodology and Inputs Already in the Record.

Cherokee claims that the avoided energy rates in Hearing Exhibit 14 are "much lower" than the "must-take" 5-year rates DEC quoted to Cherokee in October 2018 and described by DEC/DEP Witness Keen. Petition at 2-3. However, this too is a misrepresentation of the record. In fact, the only difference between the September 2018 rates presented by Witness Keen and Hearing Exhibit 14 is that DEC has now agreed to offer Cherokee the more favorable 10-year dispatchable tolling agreement structure, as recognized in Order No. 2021-604. The rates presented in Hearing Exhibit 14 were calculated using the *same* methodology and inputs that DEC used in October 2018—which is also consistent with the methodology later approved by the Commission in Order No. 2019-881(A). (Hrg. Ex. 14, p. 1.) Any perceived difference in the rate is the result of converting the 5-year "must-take" rates to the 10-year dispatchable tolling structure that the Parties have agreed to adopt in the new PPA. (Hrg. Ex. 14, p. 1 ("Although the DEC October 2018 rates presented to Cherokee were calculated based upon a "must-take" PPA

structure, they are presented here calculated based upon a dispatchable tolling agreement PPA structure for comparison[.]").)

Cherokee argues that the avoided energy rates presented in Hearing Exhibit 14 are entirely new based, in part, on the claim that Witness Freund testified that the avoided energy rate was the "one thing that's missing." Petition at 4. In fact, however, after Commissioner C. Williams clarified that she was interested in "just the Duke numbers" (Tr. Vol. 2, p. 385), Witness Freund clarified that he could provide an avoided energy price quote for February 2021 and "maybe" September 2018. (Tr. Vol. 2, p. 386.) Mr. Freund also explained that Duke would be able to provide a "better quality representation" of Cherokee's "avoided energy cost value" using the Companies' standardized peaker method using a production cost model to simulate the Cherokee facility with its dispatchable characteristics versus the "approximation" offered by Cherokee Witness Strunk. (Tr. Vol. 2, p. 385.) Both DEC/DEP Witnesses Snider and Freund extensively addressed the peaker methodology and inputs used in calculating avoided energy cost rates for Cherokee. (Tr. Vol. 2, pp. 338.4-5, 390.31-32.) As requested by Commissioner C. Williams (and accepted into the record without objection), Hearing Exhibit 14 presents DEC's ten-year dispatchable tolling avoided energy rates for the Cherokee facility as of the September 2018 LEO date selected by Cherokee, calculated based upon this standardized and accepted methodology approved by this Commission in Order No. 2019-881(A).

3. Witness Freund Never Accepted Witness Strunk's $43/kW-year Rate as Reasonable

Cherokee suggests several times that Witness Freund never contested and, rather, "implicitly acknowledged" as reasonable Witness Strunk's calculation of a $43/kW-year avoided energy rate because Witness Freund referenced that rate in his pre-filed testimony.

Petition at 2. This, too, is a misrepresentation of Witness Freund's testimony. In addition to the $20/kW-year payment of start costs, which Witness Freund subtracted from Witness Strunk's initial $63/kW-year avoided energy rate, Witness Freund identified a number of additional issues with Witness Strunk's calculation that he did not attempt to quantify. For example, Witness Freund explained that Witness Strunk's calculations "greatly over-simplify the determination of an avoided cost rate" by failing to use a production cost model. (Tr. Vol. 2, p. 338.12.) Indeed, he expressly noted that Witness Strunk's calculation is "flawed in a number of ways" and "should not be relied on as an accurate representation of DEC's avoided cost since it falls far short of the methodology that has been established by this Commission." (Tr. Vol. 2, p. 338.12, 345.) Under any interpretation of these facts, Witness Freund's testimony can hardly be described as "implicitly acknowledging" the $43/kw-year rate. (Tr. Vol. 2, p. 345) (Freund, explaining that "[Strunk's] rate, as calculated, significantly exceeds DEC's avoided cost at any point during the negotiations")

B. "Substantial" Record Evidence Supports the Commission's Adoption of the Avoided Capacity Rate Set Forth in Hearing Exhibit 14

Cherokee next argues that the Commission "ignored" evidence supporting Witness Strunk's calculated $47/kW-year avoided capacity rate. Petition. at 6. To the contrary, however, the Commission's Clarification Order is clear that it finds persuasive the Companies' interpretation of PURPA, FERC's implementing regulations, and South Carolina law that a utility should pay a QF for capacity only in years where that utility has an undesignated capacity need as determined in the utility's integrated resource plan ("IRP"). Clarification Order at 8 ("Hearing Exhibit 14 . . . calculated the avoided cost rate in accordance with the provisions of PURPA and applicable law existing at the time

Cherokee established its LEO with DEC[.]"). In this case, both DEC/DEP Witnesses Bowman and Snider testified that a "central tenet of PURPA provides that customers should not be required to pay QFs for avoided capacity unless the QF is actually offsetting a capacity need of the utility." (Tr. Vol. 2, p 390.21.) Witness Snider went on to explain the methodology the Companies used to calculate their respective first year of avoided capacity need. (Tr. Vol. 2, pp. 390.21-.22, 25.) Applying this methodology, Witness Snider testified that DEC's first avoidable capacity need as identified in its 2018 IRP was projected to arise in 2028. (Tr. Vol. 2, p. 390.29.) Accordingly, the forecasted ten-year term avoided cost rates that DEC included in Hearing Exhibit 14 appropriately calculated only two years of capacity payments to Cherokee over the term of the contract. Under any interpretation of these facts, the Companies have established ample record evidence to support their calculated first year of undesignated capacity need and the methodology DEC used to calculate the rates presented in Hearing Exhibit 14.

III. Conclusion

With respect to issues raised on reconsideration, Cherokee's request for relief, if granted, would have DEC treat Cherokee more favorably than other similarly situated QFs, and would impose unjust and unreasonable rates on DEC's customers that exceed DEC's avoided costs calculated using the Commission-approved methodology.

For all of these reasons, the Companies respectfully request that the Commission deny Cherokee's Motion for Reconsideration and Rehearing.

Respectfully submitted this, the 3rd day of November, 2021

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